CIVIL JURY INSTRUCTIONS

Judicial Council of California

Advisory Committee on Civil Jury Instructions

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Judicial Council Advisory Committee on Civil Jury Instructions Appointed by the Honorable Chief Justice Ronald M. George

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Preface

The California Judicial Council Task Force on Jury Instructions was charged by Chief Justice Ronald George with writing "jury instructions that both accurately state the law and are more easily understandable to jurors."[i] In September of 2003, the Judicial Council approved the publication of the jury instructions prepared by the task force's Subcommittee on Civil Instructions. During the initial drafting process, sets of instructions were released for public comment. That release stimulated public critique and enabled the drafters to refine both the particular instructions and the more global choices about format and approach.

The newly created Advisory Committee on Civil Jury Instructions is charged with maintaining and updating the published jury instructions. The committee is circulating this set of proposed revisions to the jury instructions. These revisions were generated in response to recent developments in the law, as well as to comments the committee has received since publication. Changes to the civil instructions will be published in July 2004.

The Chief Justice has encouraged the committee to solicit broad input from those representing a wide rage of views and experience. This set of revisions is being released to obtain the benefit of such input. The committee is interested in reactions to style, format, legal accuracy, clarity, and usefulness of accompanying bench notes and commentary. The committee is not a law revision commission. Our goal is to produce instructions that accurately explain the existing law in a manner the average juror can readily understand and that the trial bench and bar will find helpful. We appreciate your willingness to assist in this effort.

[i] *Videotape,* Address of Chief Justice Ronald George to Task Force on Jury Instructions (Judicial Council of California, Administrative Office of the Courts 2/18/97).

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INTRODUCTORY INSTRUCTIONS

107. Witnesses *(Revised 2004)*

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense ~~the things that~~ <u>what</u> he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of his or her race, sex, religion, occupation, sexual orientation, [or] national origin [or [*insert any other impermissible form of bias***].].**

Directions for Use

This instruction should be given as an introductory instruction.

Sources and Authority

- Evidence Code section 312 provides:

  Except as otherwise provided by law, where the trial is by jury:
  (a) All questions of fact are to be decided by the jury.
  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

  Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
  (a) His demeanor while testifying and the manner in which he testifies.
  (b) The character of his testimony.
  (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
  (d) The extent of his opportunity to perceive any matter about which he testifies.
  (e) His character for honesty or veracity or their opposites.
  (f) The existence or nonexistence of a bias, interest, or other motive.
  (g) A statement previously made by him that is consistent with his testimony at the hearing.
  (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
  (i) The existence or nonexistence of any fact testified to by him.
  (j) His attitude toward the action in which he testifies or toward the giving of testimony.
  (k) His admission of untruthfulness.

- Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact." According to former Code of Civil Procedure section 2061, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

Secondary Sources

1A California Trial Guide, Unit 22, Rules Affecting Admissibility of Evidence, § 22.30 (Matthew Bender)

48 California Forms Pleading and Practice, Ch. 551, Trial, § 551.122 (Matthew Bender)

303. Breach of Contract—Essential Factual Elements *(Revised 2004)*

To recover damages from [*name of defendant***] for breach of contract, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into a contract;**

2. **That [***name of plaintiff***] did all, or substantially all, of the significant things that the contract required [him/her/it] to do [or that [he/she/it] was excused from having to do those things];**

3. **That all conditions required for [***name of defendant***]'s performance had occurred;**

4. **That [***name of defendant***] failed to do something that the contract required [him/her/it] to do; and**

5. **That [***name of plaintiff***] was harmed by that failure.**

~~**If you decide that [***name of plaintiff***] has proved each of the above, your verdict on this claim must be for [***name of plaintiff***]. If you do not find that all of the above have been proved, your verdict must be for [***name of defendant***].**~~

Directions For Use

Read this instruction in conjunction with Instruction 300, *Essential Factual Elements.* In many cases, some of the above elements may not be contested. In those cases, users should delete the elements that are not contested so that the jury can focus on the contested issues.

If the allegation is that the defendant breached the contract by doing something that the contract prohibited, then change element 4 to the following: "That [*name of defendant*] did something that the contract prohibited [him/her/it] from doing."

Equitable remedies are also available for breach. "As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]' " (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8 [587 P.2d 1136]; *Selby Contractors, Inc. v. McCarthy* (1979) 91 Cal.App.3d 517, 524 [154 Cal.Rptr. 164].) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671 [111 Cal.Rptr. 693, 517 P.2d 1157].)

Sources and Authority

- A complaint for breach of contract must include the following: (1) the existence of a contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damages to plaintiff therefrom. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [92 Cal.Rptr. 723].) Additionally, if the defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)

- Civil Code section 1549 provides: "A contract is an agreement to do or not to do a certain thing." Courts have defined the term as follows: "A contract is a voluntary and lawful agreement, by competent parties, for good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)

- Section 1 of the Restatement Second of Contracts provides: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

- "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a breach. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach." (1 Witkin, Summary of California Law (9th ed. 1987) § 791, internal citations omitted.) "Ordinarily, a breach is the result of an intentional act, but negligent performance may also constitute a breach, giving rise to alternative contract and tort actions." (*Ibid.*)

- The doctrine of substantial performance does not apply to the party accused of the breach. Section 235(2) of the Restatement Second of Contracts provides: "When performance of a duty under a contract is due any non-performance is a breach." Comment (b) to section 235 states that "[w]hen performance is due, ... anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial.

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, § 791

13 California Forms of Pleading and Practice, Ch. 140, Contracts, § 140.50 (Matthew Bender)

5 California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

325. Breach of Covenant of Good Faith and Fair Dealing Essential Factual Elements *(New 2004)*

In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to destroy or injure the right of any other party to receive the benefits of the contract. [*Name of plaintiff***] claims that [***name of defendant***] violated the duty to act fairly and in good faith. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into a contract;**

2. **That [***name of plaintiff***] did all, or substantially all of the significant things that the contract required [him/her/it] to do [or that [he/she/it] was excused from having to do those things];**

3. **That all conditions required for [***name of defendant***]'s performance had occurred;**

4. **That [***name of defendant***] [***insert description of conduct alleged to have violated the covenant of good faith and fair dealing***]; and**

5. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

Directions For Use

This instruction should be given only when the plaintiff has brought a separate cause of action for breach of the covenant of good faith and fair dealing. In many cases, some of the above elements may not be contested. In those cases, users should delete the elements that are not contested so that the jury can focus on the contested issues.

Sources and Authority

- Section 205 of the Restatement Second of Contracts provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198], internal citation omitted.)

- " ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' [] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371–372 [6 Cal.Rptr.2d 467], internal citations omitted.)

- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made.* The covenant thus cannot ' " 'be endowed with an existence independent of its contractual underpinnings.' " ' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349–350 [100 Cal.Rptr.2d 352], internal citations omitted, italics in original.)

- "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' … 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032 [14 Cal.Rptr.2d 335], internal citations omitted.)

- "There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties … the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract." (*Racine & Laramie, Ltd., supra,* 11 Cal.App.4th at p. 1032, internal citations omitted.)

- "The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily 'a question of fact unless only one inference [can] be drawn from the evidence.' " (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 [108 Cal.Rptr.2d 10], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1990) Contracts, § 743, p. 674

330. Affirmative Defense—Unilateral Mistake of Fact *(Revised 2004)*

[*Name of defendant***] claims that there was no contract because [he/she/it] was mistaken about [***insert description of mistake***]. To succeed, [***name of defendant***] must prove all of the following:**

1. That [*name of defendant***] was mistaken about [***insert description of mistake***];**

~~1~~2. That [*name of plaintiff***] knew [***name of defendant***] was mistaken ~~about [***insert description of mistake***]~~ and used that mistake to take advantage of [him/her/it];**

~~2~~3. That [*name of defendant***]'s mistake was not caused by [his/her/its] excessive carelessness; and**

~~3~~4. That [*name of defendant***] would not have agreed to enter into the contract if [he/she/it] had known about the mistake.**

If you decide that [*name of defendant***] has proved all of the above, then no contract was created.**

Directions for Use

If the mistake is one of law, this may not be a jury issue.

This instruction does not contain the requirement that the mistake be material to the contract because the materiality of a representation is a question of law. (*Merced County Mutual Fire Insurance Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [284 Cal.Rptr. 680].) Accordingly, the judge would decide whether an alleged mistake was material, and that mistake would be inserted into this instruction.

Sources and Authority

- The Civil Code provides that consent is not free when obtained through duress, menace, fraud, undue influence, or mistake, and is deemed to have been so obtained when it would not have been given but for such fraud or mistake. (Civ. Code, §§ 1567, 1568.)

- Civil Code section 1576 provides: "Mistake may be either of fact or law."

- Civil Code section 1577 provides the following definition of mistake of fact:

Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

- Civil Code section 1578 defines mistake of law:

  Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:

  1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
  2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

- "It is settled that to warrant a unilateral rescission of a contract because of mutual mistake, the mistake must relate to basic or material fact, not a collateral matter." (*Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 932 [114 Cal.Rptr. 673].)

- The following quotation explains how unilateral mistakes can be used as a defense: "A mistake need not be mutual. Unilateral mistake is ground for relief where the mistake is due to the fault of the other party or the other party knows or has reason to know of the mistake. ... To rely on a unilateral mistake of fact, [the party] must demonstrate his mistake was not caused by his 'neglect of a legal duty.' Ordinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007–1008 [211 Cal.Rptr. 45], internal citations omitted.)

- To prevail on a unilateral mistake claim, the defendant must prove that the plaintiff knew that the defendant was mistaken and that plaintiff used that mistake to take advantage of the defendant: "Defendants contend that a material mistake of fact—namely, the defendants' belief that they would not be obligated to install a new roof upon the residence—prevented contract formation. A unilateral mistake of fact may be the basis of relief. However, such a unilateral mistake may not invalidate a contract without a showing that the other party to the contract was aware of the mistaken belief and unfairly utilized that mistaken belief in a manner enabling him to take advantage of the other party." (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 944 [127 Cal.Rptr. 846], internal citations omitted.)

- "Failure to make reasonable inquiry to ascertain or effort to understand the meaning and content of the contract upon which one relies constitutes neglect of a legal duty such as will preclude recovery for unilateral mistake of fact." (*Wal-Noon Corporation v. Hill* (1975) 45 Cal.App.3d 605, 615 [119 Cal.Rptr. 646].) However, "[o]rdinary

negligence does not constitute the neglect of a legal duty as that term is used in section 1577." (*Architects & Contractors Estimating Service, Inc. v. Smith, supra,* 164 Cal.App.3d at p. 1008.)

- Neglect of legal duty has been equated with "gross negligence," which is defined as "the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644].)

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 365–381

17 California Forms of Pleading and Practice, Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, §§ 215.50–215.57, 215.141 (Matthew Bender)

9 California Points and Authorities, Ch. 92, Duress, Menace, Fraud, Undue Influence, and Mistake (Matthew Bender)

27 California Legal Forms, Ch. 77, Discharge of Obligations, § 77.350 (Matthew Bender)

VF-300. Breach of Contract *(New 2004)*

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] and [***name of defendant***] enter into a contract?**

   ___Yes **___No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] do all, or substantially all, of the significant things that the contract required [him/her/it] to do?**

   ___Yes **___No**

   If your answer to question 2 is yes, then skip question 3 and answer question 4. If you answered no, answer question 3.

3. **Was [***name of plaintiff***] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?**

   ___Yes **___No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did all the conditions occur that were required for [***name of defendant***]'s performance?**

   ___Yes **___No**

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Did [***name of defendant***] fail to do something that the contract required [him/her/ it] to do?**

   ___Yes **___No**

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of plaintiff***] harmed by that failure?**

___Yes ___No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions For Use

The special-verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow. If the allegation is that the defendant breached the contract by doing something that the contract prohibited, then change question 5 to the following: "Did [*name of defendant*] do something that the contract prohibited [him/her/it] from doing?"

If specificity is not required, users do not have to itemize the damages listed in question 7. The breakdown is optional; depending on the circumstances, users may wish to break

down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-301. Breach of Contract—Affirmative Defense Unilateral Mistake of Fact *(New 2004)*

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] mistaken about [***insert description of mistake***]?**

   ___Yes **___No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [***name of plaintiff***] know that [***name of defendant***] was mistaken and use that mistake to take advantage of [him/her/it]?**

   ___Yes **___No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s mistake caused by [his/her/its] excessive carelessness?**

   ___Yes **___No**

   If your answer to question 3 is no, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Would [***name of defendant***] have agreed to enter into the contract if [he/she/it] had known about the mistake?**

   ___Yes **___No**

Signed: _____
Presiding Juror
Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions For Use

The special-verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This form is not a stand-alone verdict form. It may be incorporated into VF-300, *Breach of Contract*, if the elements of the affirmative defense are at issue.

This verdict form is based on Instruction 330, *Affirmative Defense—Unilateral Mistake of Fact.* The verdict forms do not address all available affirmative defenses. The parties may need to create their own verdict forms to fit the issues involved in the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

VF-302. Breach of Contract—Affirmative Defense—Duress *(New 2004)*

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] use a wrongful act or wrongful threat to pressure [***name of defendant***] into consenting to the contract?**

   ___Yes ___No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***] so afraid or intimidated by the wrongful act or wrongful threat that [he/she] did not have the free will to refuse to consent to the contract?**

   ___Yes ___No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Would [***name of defendant***] have consented to the contract without the wrongful act or wrongful threat?**

   ___Yes ___No

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions For Use

The special-verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This form is not a stand-alone verdict form. It may be incorporated into VF-300, *Breach of Contract,* if the elements of the affirmative defense are at issue.

This verdict form is based on Instruction 332, *Affirmative Defense—Duress.* The verdict forms do not address all available affirmative defenses. The parties may need to create their own verdict forms to fit the issues involved in the case.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

409. Liability of Instructors, Trainers, or Coaches *(Revised 2004)*

[*Name of plaintiff***] claims [he/she] was harmed by [***name of defendant***]'s [coaching/ training/instruction]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**

2. **That [***name of defendant***] ~~increased the risk of harm beyond those risks that are a normal part of~~ intended to cause [***name of plaintiff***] injury or acted recklessly in that [his/her] conduct was totally outside the range of ordinary activity involved in teaching or coaching the sport in which [***name of plaintiff***] was participating;**

3. **That [***name of plaintiff***] was harmed; and**

4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103], internal citation omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn*, *supra*, 31 Cal.4th at p. 1006.)

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

- "[T]he mere existence of an instructor/pupil relationship does not necessarily preclude application of 'primary assumption of the risk.' Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction." (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368–1369 [59 Cal.Rptr.2d 813].)

- "Instructors, like commercial operators of recreational activities, 'have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.' " (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 435 [52 Cal.Rptr.2d 812], internal citations omitted.)

- " 'Primary assumption of the risk' applies to injuries from risks 'inherent in the sport'; the risks are not any the less 'inherent' simply because an instructor encourages a student to keep trying when attempting a new skill." (*Allan, supra,* 51 Cal.App.4th at p. 1369.)

- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether... .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.' " (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436–1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

- " '[T]he existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' Thus, when the injury occurs in a sports setting the court must decide whether

the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion of duty." (*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185], internal citations omitted.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

Secondary Sources

6 Witkin, Summary of California Law (2002 supp.) Torts, §§ 1090A–1090C, pp. 310–329

1 Levy et al., California Torts, Ch. 4, Comparative Negligence, Assumption of the Risk, and Related Defenses, § 4.03 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, Games, Sports, and Athletics, Injuries to Participants (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, Negligence (Matthew Bender)

16 California Points and Authorities, Ch. 165, Negligence, § 165.401 (Matthew Bender)

605. Breach of Fiduciary Duty—Essential Factual Elements *(Revised 2004)*

~~**An attorney has a fiduciary duty to the client. A fiduciary duty is the duty of good faith and undivided loyalty.**~~

[*Name of plaintiff***] claims that [he/she/it] was harmed because [***name of defendant***] breached ~~[his/her] fiduciary~~ an attorney's duty ~~of [***insert duty, e.g., confidentiality~~ *describe duty, e.g., "not to represent clients with conflicting interests"* **]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] breached the ~~fiduciary~~ duty of an attorney [***describe duty***];**

2. **That [***name of plaintiff***] was harmed; and**

3. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Directions for Use

The existence of a fiduciary relationship is a question of law. Whether an attorney has breached that fiduciary duty is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890 [250 Cal.Rptr. 339].)

Sources and Authority

- "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. [Citation.]" (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1044 [74 Cal.Rptr.2d 550].)

- " 'The relation between attorney and client is a fiduciary relation of the very highest character.' " (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189 [98 Cal.Rptr. 837, 491 P.2d 421].)

- Breach of fiduciary duty is a concept that is separate and distinct from traditional professional negligence but which still comprises legal malpractice. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768].)

- "Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct

is a matter beyond common knowledge." (*Stanley, supra,* 35 Cal.App.4th at p. 1087 [internal citations omitted].)

- "The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client.' " (*Stanley, supra,* 35 Cal.App.4th at p. 1087, quoting *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 45 [5 Cal.Rptr.2d 571]; *David Welch Co., supra,* 203 Cal.App.3d at p. 890.)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 118, pp. 155–157

3 Levy et al., California Torts, Ch. 32, Liability of Attorneys, § 32.02 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, Attorney Professional Liability (Matthew Bender)

2 California Points and Authorities, Ch. 24, Attorneys at Law (Matthew Bender)

722. Adult's Liability for Minor's Permissive Use of Motor Vehicle
(Revised 2004)

[*Name of plaintiff***] claims that [he/she] was harmed and that [***name of defendant***] is responsible for the harm because [***name of defendant***] gave [***name of minor***] permission to operate the vehicle. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of minor***] was negligent in operating the vehicle;**

2. **That [***name of plaintiff***] was harmed;**

3. **That [***name of minor***]'s negligence was a substantial factor in causing the harm;**

4. **That at the time of the collision [***name of defendant***] had ~~a right to control~~ custody of [***name of minor***]; and**

5. **That [***name of defendant***], by words or conduct, gave [***name of minor***] permission to use the vehicle.**

Sources and Authority

- Vehicle Code section 17708 provides: "Any civil liability of a minor, whether licensed or not under this code, arising out of his driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor is hereby imposed upon the parents, person, or guardian and the parents, person, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle."

- "[I]t was incumbent upon [plaintiffs], in order to fasten liability upon [the parents] for the minor's negligence, to establish two necessary facts. These facts were, first, that at the time the collision occurred respondents had custody of the minor and, second, that they had given to the minor their permission, either express or implied, to his driving the automobile by the negligent operation of which the injuries were caused." (*Sommers v. Van Der Linden* (1938) 24 Cal.App.2d 375, 380 [75 P.2d 83].)

- "Whether or not a sufficient custody existed, within the meaning of the statute, might well depend upon evidence of specific facts showing the nature, kind and extent of the custody and right of control which the respondent [grandfather] actually had." (*Hughes v. Wardwell* (1953) 117 Cal.App.2d 406, 409 [255 P.2d 881].)

- "In the absence of statute, ordinarily a parent is not liable for the torts of his minor child. A parent, however, becomes liable for the torts of his minor child if that child in committing a tort is his agent and acting within the child's authority." (*Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904–905 [151 Cal.Rptr. 456], internal citations omitted.)

- " '[P]erson * * * having custody of the minor' means person having permanent legal custody, and not a person such as a school teacher whose control over his pupils is limited in time and scope." (*Hathaway v. Siskiyou Union High School Dist.* (1944) 66 Cal.App.2d 103, 114 [151 P.2d 861]

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 1025–1027, pp. 418–421; id. (2002 supp.) at §§ 1025–1026, pp. 289–290

2 Levy et al., California Torts (1993) Motor Vehicles, § 20.30[1]

California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.42– 4.43, pp. 120–121

CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 82, Automobiles: Causes Of Action, § 82.16, Ch. 83, Automobiles: Bringing the Action, § 83.133 (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice: Torts (1992) Motor Vehicles, § 25.52, pp. 77–78

1904. Opinions as Statements of Fact *(Revised 2004)*

Ordinarily, an opinion is not considered a representation of fact. An opinion is a person's belief that a fact exists, a statement regarding a future event, or a judgment about quality, value, authenticity, or similar matters. However, [*name of defendant***]'s opinion is considered a representation of fact if [***name of plaintiff***] proves that:**

[[*Name of defendant***] claimed to have special knowledge about the subject matter that [***name of plaintiff***] did not have;] [or]**

[[*Name of defendant***] made a representation, not as a casual expression of belief, but in a way that declared the matter to be true;] [or]**

[[*Name of defendant***] had a relationship of trust and confidence with [***name of plaintiff***];] [or]**

[[*Name of defendant***] had some other special reason to expect that [***name of plaintiff***] would rely on his or her opinion~~;~~.] ~~[or]~~**

~~**[[Name of defendant] represented that [his/her/its] product was safe.]**~~

Directions for Use

This is not a stand-alone instruction. It should be read in conjunction with one of the elements instructions (Instructions 1900–1903).

The second bracketed option appears to be limited to cases involving professional opinions. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

Alternative bracketed options that do not apply to the facts of the case may be deleted.

Sources and Authority

- Restatement of Torts, section 542 states:

  The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker
  (a) purports to have special knowledge of the matter that the recipient does not have, or

(b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or
(c) has successfully endeavored to secure the confidence of the recipient, or
(d) has some other special reason to expect that the recipient will rely on his opinion.

- Restatement Second of Torts, section 538A states: "A representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity, or other matters of judgment."

- Restatement Second of Torts, section 539 states:

(1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement
(a) that the facts known to the maker are not incompatible with his opinion; or
(b) that he knows facts sufficient to justify him in forming it.
(2) In determining whether a statement of opinion may reasonably be so interpreted, the recipient's belief as to whether the maker has an adverse interest is important.

- "Generally, actionable misrepresentation must be one of existing fact; 'predictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud . …' But there are exceptions to this rule: '(1) where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; [and,] (3) where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion.' " (*Cohen v. S&S Construction Co.* (1983) 151 Cal.App.3d 941, 946 [201 Cal.Rptr. 173], internal citations omitted.)

- "A statement couched as an opinion, by one having special knowledge of the subject, may be treated as an actionable misstatement of fact. Whether a statement is nonactionable opinion or actionable misrepresentation of fact is a question of fact for the jury." (*Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1080–1081 [76 Cal.Rptr.2d 911], internal citations omitted.)

- "Puffing," or sales talk, is generally considered opinion, unless it involves a representation that a product is safe. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104 [120 Cal.Rptr. 681, 534 P.2d 377]; see also *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 424 [264 Cal.Rptr. 779].)

- "Under certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is 'not a casual expression of belief' but 'a deliberate affirmation of the matters stated,' it may be regarded as a positive assertion of fact. Moreover, when a party possesses or

holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." (*Bily*, *supra,* 3 Cal.4th at p. 408, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 678–682

3 Levy et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.03[1][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, Fraud and Deceit (Matthew Bender)

10 California Points and Authorities, Ch. 105, Fraud and Deceit (Matthew Bender)

2 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 22:21–22:28

2308. Rescission for Misrepresentation or Concealment in Insurance Application—Essential Factual Elements *(Revised 2004)*

[*Name of insurer***] claims that no insurance contract was created because [***name of insured***] [concealed an important fact/made a false representation] in [his/her/its] application for insurance. To establish this claim, [***name of insurer***] must prove all of the following:**

1. **That [***name of insured***] submitted an application for insurance with [***name of insurer***];**

2. **That in the application for insurance [***name of insured***], [intentionally] ~~or unintentionally,~~ [failed to state/represented] that [insert omission or alleged misrepresentation];**

3. **[That the application asked for that information;]**

4. **That [***name of insured***] [select one of the following:]**

   [knew that [*insert omission***];]**

   [knew that this representation was not true;]

5. **That [***name of insurer***] would not have issued the insurance policy if [***name of insured***] had stated the true facts in the application;**

6. **That [***name of insurer***] gave [***name of insured***] notice that it was rescinding the insurance policy; and**

7. **That [***name of insurer***] [returned/offered to return] the insurance premiums paid by [***name of insured***].**

Directions for Use

Use the bracketed word "intentionally" for cases involving Insurance Code section 2701.

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information. Elements 5 and 6 may be resolved by the language of the complaint, in which case these could be decided as a matter of law. (Civ. Code, 1691.)

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

Sources and Authority

- Civil Code section 1689(b)(1) provides that a party may rescind a contract under the following circumstances: "If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

- Insurance Code section 650 provides: "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract. The rescission shall apply to all insureds under the contract, including additional insureds, unless the contract provides otherwise."

- Insurance Code section 330 provides: "Neglect to communicate that which a party knows, and ought to communicate, is concealment."

- Insurance Code section 331 provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."

- Insurance Code section 334 provides: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

- Insurance Code section 338 provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

- Insurance Code section 359 provides: "If a representation is false in a material point … the injured party is entitled to rescind the contract from the time the representation becomes false."

- "When the [automobile] insurer fails … to conduct … a reasonable investigation [of insurability] it cannot assert … a right of rescission" under section 650 of the Insurance Code as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674].)

- "[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment

of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 915–916 [109 Cal.Rptr. 473, 513 P.2d 353], internal citations omitted.)

- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra*, 9 Cal.3d at p. 919.)

- "The materiality of a representation made in an application for a contract of insurance is determined by a subjective standard (i.e., its effect on the particular insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause …, the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the objective standard of its effect upon a reasonable insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], italics in original, internal citation omitted.)

- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)

- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished … ." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. … [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co., supra*, 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

2 California Insurance Law & Practice, Ch. 8, The Insurance Contract, § 8.10[1] (Matthew Bender)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Rescission and Reformation, §§ 21.2–21.12, 21.35–21.37, pp. 757–764, 785–786

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 5:143–5:146, 5:153–5:159.1, 5:160–5:287, 15:241–15:256, pp. 5-27–5-28, 5-30–5-32, 5-32.1–5-54, 15-42–15-44

2 California Uninsured Motorist Law, Ch. 24, Bad Faith in Uninsured Motorist Law, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender)

12 California Points and Authorities, Ch. 120, Insurance, §§ 120.250– 120.251, 120.260 (Matthew Bender)

VF-2301. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment *(2004 Revision)*

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] suffer a loss covered under an insurance policy with [***name of defendant***]?**

   ___Yes ___No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [***name of defendant***] notified of the loss?**

   ___Yes ___No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [***name of defendant***] unreasonably [fail to pay/delay payment of] policy benefits?**

   ___Yes ___No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was [***name of defendant***]'s [failure to pay/delay in payment of] policy benefits a substantial factor in causing harm to [***name of plaintiff***]?**

   ___Yes ___No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $ _____]

[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $ _____]

TOTAL $ _____

~~**[6. What amount do you award as punitive damages? $ _____]**~~

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 2331, *Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If punitive damages are claimed, combine this form with the appropriate verdict form numbering from VF-3900 to VF-3904.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

2526. Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor) *(New 2004)*

[*Name of defendant***] claims that [***name of plaintiff***] could have avoided some or all of the harm with reasonable effort. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] took reasonable steps to prevent and correct workplace sexual harassment;**

2. **That [***name of plaintiff***] unreasonably failed to use [[***name of defendant***]'s harassment complaint procedures/the preventive and corrective measures that [***name of defendant***] provided]; and**

3. **That the reasonable use of [***name of defendant***]'s procedures would have prevented some or all of [***name of plaintiff***]'s harm.**

You should consider the reasonableness of [*name of plaintiff***]'s actions in light of the circumstances facing [him/her] at the time, including [his/her] ability to report the conduct without facing undue risk, expense, or humiliation.**

If you decide that [*name of defendant***] has proved this claim, you should not include in your award of damages the amount of damages that [***name of plaintiff***] could have avoided.**

Directions for Use

In the second element, select the alternative language that is most appropriate to the facts of the case.

For an instruction on failure to mitigate damages generally, see Instruction 3930, *Mitigation of Damages (Personal Injury).*

Sources and Authority

- "[W]e conclude that under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. But strict liability is not absolute liability in the sense that it precludes all defenses. Even under a strict liability standard, a plaintiff's own conduct may limit the amount of damages recoverable or bar recovery entirely." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042, internal citations omitted.)

- "Under the avoidable consequences doctrine as recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure. The reasonableness of the injured party's efforts must be judged in light of the situation existing at the time and not with the benefit of hindsight. 'The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law.' The defendant bears the burden of pleading and proving a defense based on the avoidable consequences doctrine." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1043, internal citations omitted.)

- "Although courts explaining the avoidable consequences doctrine have sometimes written that a party has a 'duty' to mitigate damages, commentators have criticized the use of the term 'duty' in this context, arguing that it is more accurate to state simply that a plaintiff may not recover damages that the plaintiff could easily have avoided." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1043, internal citations omitted.)

- "We hold … that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1044.)

- "This defense will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1044, internal citations omitted.)

- "If the employer establishes that the employee, by taking reasonable steps to utilize employer-provided complaint procedures, could have caused the harassing conduct to cease, the employer will nonetheless remain liable for any compensable harm the employee suffered before the time at which the harassment would have ceased, and the employer avoids liability only for the harm the employee incurred thereafter." (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1045, internal citations omitted.)

- "We stress also that the holding we adopt does not demand or expect that employees victimized by a supervisor's sexual harassment must always report such conduct immediately to the employer through internal grievance mechanisms. The employer may lack an adequate antiharassment policy or adequate procedures to enforce it, the employer may not have communicated the policy or procedures to the victimized

employee, or the employee may reasonably fear reprisal by the harassing supervisor or other employees. Moreover, in some cases an employee's natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor." (*State Dept. of Health Services*, *supra*, 31 Cal.4th at p. 1045.)

3903D. Lost Earning Capacity (Economic Damage) *(Revised 2004)*

[*Insert number, e.g., "4."***] The loss of [***name of plaintiff***]'s ability to earn money.**

To recover damages for the loss of the ability to earn money, [*name of plaintiff***] must prove the amount of money [he/she] would have been reasonably certain to earn if the injury had not occurred. It does not matter ~~if~~ whether [he/she] has ~~no~~ a work history.**

Directions for Use

This instruction is not intended for use in employment cases.

If lost profits are asserted as an element of damages, see Instruction 3903N, *Lost Profits (Economic Damage).*

Sources and Authority

- "Damages may be awarded for lost earning capacity without any proof of actual loss of earnings." (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348, fn. 6 [100 Cal.Rptr.2d 854], internal citations omitted.)

- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connelly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "[I]t is not necessary for a party to produce expert testimony on future earning ability although some plaintiff's attorneys may choose as a matter of trial tactics to present such evidence." (*Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1282 [78 Cal.Rptr.2d 557], internal citations omitted.)

- The Supreme Court has stated: " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury

undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1404–1405

4 Levy et al., California Torts, Ch. 52, Medical Expenses and Economic Loss, §§ 52.10–52.11 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, § 1.42

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:15

DAMAGES

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated
(Revised 2004)

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer <u>for the conduct that harmed the plaintiff</u> and to discourage ~~him or her and others from~~ similar conduct in the future.**

You may award punitive damages only if [*name of plaintiff***] proves by clear and convincing evidence that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [***name of defendant***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so ~~mean~~, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to ~~deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause~~ <u>harm</u> [***name of plaintiff***] ~~injury~~.**

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. ~~In deciding the amount of punitive damages, if any,~~ <u>If you decide to award punitive damages</u>, you should consider all of the following <u>in determining the amount</u>:

(a) How reprehensible was [*name of defendant***]'s conduct?**

(b) ~~Is there a reasonable relationship between the amount of punitive damages and~~ <u>What is a reasonable amount of punitive damages in light of</u> [*name of plaintiff***]'s harm?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct?**

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use Instruction 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use Instruction 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.*

"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585]. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court's reasoning. (See, *e.g.*, *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71]; *Simon v. San Paolo U.S. Holding Co., Inc.* (2003) 113 Cal.App.4th 1137, 1162, fn. 12 [rejecting an argument that, after *Campbell*, wealth of the defendant may not be considered in awarding punitive damages]; *Henley v. Philip Morris Inc.*, (2003) 112 Cal.App.4th 198, review granted, depublished by *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars.])

At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases

have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

~~In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585], citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."~~

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  (c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that

the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' "

(*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 725, internal citations omitted.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, 1335–1341, 1369–1381

4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.15–14.18

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

3941. Punitive Damages—Individual Defendant Bifurcated Trial (First Phase) *(Revised 2004)*

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. At this time, you must decide whether [***name of plaintiff***] has proved by clear and convincing evidence that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [***name of defendant***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so ~~mean,~~ vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to ~~deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause~~ harm [***name of plaintiff***] ~~injury~~.**

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  ...
  (c) As used in this section, the following definitions shall apply:
  (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
  (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc.*

v. Superior Court (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

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4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.01–54.06, 54.24[4][d] (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.15–14.18, 14.23

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

3942. Punitive Damages—Individual Defendant Bifurcated Trial (Second Phase) *(Revised 2004)*

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer <u>for the conduct that harmed the plaintiff</u> and to discourage ~~him or her and others from~~ similar conduct in the future.**

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. ~~In deciding the amount of punitive damages, if any,~~ <u>If you decide to award punitive damages,</u> you should consider all of the following <u>in determining the amount</u>:

(a) How reprehensible was [*name of defendant***]'s conduct?**

(b) ~~Is there a reasonable relationship between the amount of punitive damages and~~ <u>What is a reasonable amount of punitive damages in light of</u> [*name of plaintiff***]'s harm?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct?**

Directions for Use

<u>"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.</u>

<u>In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585]. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court's reasoning. (See, *e.g.*, *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71]; *Simon v. San Paolo U.S. Holding Co., Inc.* (2003) 113 Cal.App.4th 1137, 1162, fn. 12 [rejecting an argument that, after *Campbell*, wealth of the defendant may not be considered in awarding punitive damages]; *Henley v. Philip Morris Inc.*, (2003) 112 Cal.App.4th 198, review granted, depublished by *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57]</u>

[*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars.])

At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

~~In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585], citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."~~

Sources and Authority

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra*, 21 Cal.3d at p 928, internal citations and footnote omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's

actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, pp. 784–786, 1369–1381, pp. 836-852

4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.20–54.25, 54.24[4][d] (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.23

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated *(Revised 2004)*

If you decide [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/agent***]'s conduct. The purposes of punitive damages are to punish a wrongdoer <u>for the conduct that harmed the plaintiff</u> and to discourage ~~him or her and others from~~ similar conduct in the future.**

You may award punitive damages against [*name of defendant***] for [***name of employee/agent***]'s conduct only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury, or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so ~~mean,~~ vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to ~~deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause~~ <u>harm</u> [***name of plaintiff***] ~~injury~~.**

[*Name of plaintiff***] must also prove [one of] the following <u>by clear and convincing evidence</u>:**

1. **[That [***name of employee/agent***] was an officer, director, or managing agent of [***name of defendant***] <u>and was</u> acting in a [corporate/employment] capacity; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**

4. [That an officer, a director, or a managing agent of [*name of defendant***] knew of [***name of employee/agent***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. ~~In deciding the amount of punitive damages, if any,~~ If you decide to award punitive damages, you should consider all of the following in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct?**

(b) ~~Is there a reasonable relationship between the amount of punitive damages and~~ What is a reasonable amount of punitive damages in light of [*name of plaintiff***]'s harm?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct?**

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.* When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co. v.*

Campbell (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585]. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court's reasoning. (See, *e.g.*, *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71]; *Simon v. San Paolo U.S. Holding Co., Inc.* (2003) 113 Cal.App.4th 1137, 1162, fn. 12 [rejecting an argument that, after *Campbell*, wealth of the defendant may not be considered in awarding punitive damages]; *Henley v. Philip Morris Inc.*, (2003) 112 Cal.App.4th 198, review granted, depublished by *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars].)

At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings.

~~This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."~~

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated* for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116

S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

~~In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585] , citing to *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809] , the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."~~

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  (c) As used in this section, the following definitions shall apply:
    (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
    (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
    (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- <u>"[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and</u>

convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper."' (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College*

Hospital, Inc. v. Superior Court (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra*, 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723-724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, § 54.07 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3944. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase) *(Revised 2004)*

If you decide that [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/agent***]'s conduct. At this time, you must decide whether [***name of plaintiff***] has proved by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so ~~mean,~~ vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to ~~deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause~~ harm [***name of plaintiff***] ~~injury~~.**

[*Name of plaintiff***] must also prove [one of] the following by clear and convincing evidence:**

1. **[That [***name of employee/agent***] was an officer, a director, or a managing agent of [***name of defendant***] and was acting in a [corporate/employment] capacity; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of [***name of employee/agent***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

Directions for Use

Instruction 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual) — Bifurcated Trial (First Phase).* When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use Instruction 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

~~This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."~~

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:
(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490].)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144].)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his

conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898, 882 P.2d 894], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723-724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act" A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.07, 54.24[4][d] (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

3945. Punitive Damages—Entity Defendant Trial Not Bifurcated *(Revised 2004)*

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage ~~him or her and others from~~ similar conduct in the future.**

You may award punitive damages against [*name of defendant***] only if [***name of plaintiff***] proves that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [***name of defendant***] who were acting in a corporate capacity; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of defendant***]; [or]]**

3. **[That one or more officers, directors, or managing agents of [***name of defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [***name of defendant***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so ~~mean,~~ vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to ~~deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause~~ harm [***name of plaintiff***] ~~injury~~.**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. ~~In deciding the amount of punitive damages, if any,~~ If you decide to award punitive damages, you should consider all of the following in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct?**

(b) ~~Is there a reasonable relationship between the amount of punitive damages and~~ What is a reasonable amount of punitive damages in light of [*name of plaintiff***]'s harm?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish it and discourage future wrongful conduct?**

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use Instruction 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated.* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3947, *Punitive Damages—Individual and Entity Defendants—Trial not Bifurcated.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

~~This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."~~

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513,

1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585]. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court's reasoning. (See, *e.g.*, *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71]; *Simon v. San Paolo U.S. Holding Co., Inc.* (2003) 113 Cal.App.4th 1137, 1162, fn. 12 [rejecting an argument that, after *Campbell*, wealth of the defendant may not be considered in awarding punitive damages]; *Henley v. Philip Morris Inc.* (2003) 112 Cal.App.4th 198, review granted, depublished by *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars].)

At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to

the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

~~In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585], citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."~~

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  (c) As used in this section, the following definitions shall apply:
    (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
    (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
    (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566–567.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, § 54.07 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3946. Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)
(Revised 2004)

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The amount, if any, of punitive damages will be an issue decided later.**

At this time, you must decide whether [*name of plaintiff***] has proved that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [***name of defendant***] <u>who were</u> acting in a corporate capacity; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of defendant***]; [or]]**

3. **[That one or more officers, directors, or managing agents of [***name of defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [***name of defendant***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so ~~mean,~~ vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to ~~deprive [***name of plaintiff***] of property or of a legal right or otherwise to cause~~ <u>harm</u> [***name of plaintiff***] ~~injury~~.**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

Directions for Use

Instruction 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff is seeking to hold an employer or principal liable for the conduct of a specific employee or agent, use Instruction 3944, *Punitive Damages Against Employer or Principal For Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase).* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase).*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

~~This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."~~

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  (c) As used in this section, the following definitions shall apply:
    (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte*, *supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898, 882 P.2d 894], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- "'[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.07, 54.24[4][d] (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3947. Punitive Damages—Individual and Entity Defendants Trial Not Bifurcated *(Revised 2004)*

If you decide that [*name of individual defendant***]'s or [***name of entity defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage ~~him or her and others from~~ similar conduct in the future.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

You may award punitive damages against [*name of entity defendant***] only if [***name of plaintiff***] proves that [***name of entity defendant***] acted with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [***name of entity defendant***] who were acting in a corporate capacity; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of entity defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of entity defendant***]; [or]]**

4. **[That one or more officers, directors, or managing agents of [***name of entity defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so ~~mean,~~ vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to ~~deprive [~~*~~name of plaintiff~~*~~]~~ ~~of property or of a legal right or otherwise to cause~~ harm [*name of plaintiff***] ~~injury~~.**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. ~~In deciding the amount of punitive damages, if any,~~ <u>If you decide to award punitive damages,</u> you should consider all of the following separately for each defendant <u>in determining the amount</u>:

(a) How reprehensible was that defendant's conduct?

(b) ~~Is there a reasonable relationship between the amount of punitive damages and~~ <u>What is a reasonable amount of punitive damages in light of</u> [*name of plaintiff***]'s harm?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct?

Directions for Use

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use Instruction 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated,* or Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.* When punitive damages are sought against an individual defendant, use Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

~~This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."~~

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585]. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court's reasoning. (See, *e.g.*, *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71]; *Simon v. San Paolo U.S. Holding Co., Inc.* (2003) 113 Cal.App.4th 1137, 1162, fn. 12 [rejecting an argument that, after *Campbell*, wealth of the defendant may not be considered in awarding punitive damages]; *Henley v. Philip Morris Inc.* (2003) 112 Cal.App.4th 198, review granted, depublished by *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars].)

At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight."' (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's

conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

~~In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585], citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."~~

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  (c) As used in this section, the following definitions shall apply:
    (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
    (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
    (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242].)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra*, 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that

the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, § 54.07 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3948. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)

(Revised 2004)

If you decide that [*name of individual defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of individual defendant***] and, if so, against [***name of corporate defendant***]. The amount, if any, of punitive damages will be an issue decided later.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so ~~mean,~~ vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to ~~deprive [*name of plaintiff***] of property or of a legal right or otherwise to cause~~ harm [***name of plaintiff***] ~~injury~~.**

You may also award punitive damages against [*name of corporate defendant***] based on [***name of individual***]'s conduct if [***name of plaintiff***] proves [one of] the following by clear and convincing evidence:**

1. **[That [***name of individual defendant***] was an officer, director, or managing agent of [***name of corporate defendant***] and was acting in a corporate capacity at the time of the conduct constituting malice oppression or fraud; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [***name of corporate defendant***]; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] knew of [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

Directions for Use

Use Instruction 3949, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase),* for the second phase of a bifurcated trial

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use Instruction 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase),* or Instruction 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).* When damages are sought against individual defendants, use Instruction 3941, *Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase).*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

~~This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."~~

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

Sources and Authority

- Civil Code section 3294 provides, in part:

  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of

oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
...

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- " [Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr2d 898, 882 P.2d 894], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- " 'The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' " (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and

authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

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Secondary Sources

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4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.07, 54.24[4][d] (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3949. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual) Bifurcated Trial (Second Phase) *(Revised 2004)*

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage ~~him or her and others from~~ similar conduct in the future.**

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. ~~In deciding the amount of punitive damages, if any,~~ If you decide to award punitive damages, you should consider all of the following separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct?

(b) ~~Is there a reasonable relationship between the amount of punitive damages and~~ What is a reasonable amount of punitive damages in light of [*name of plaintiff***]'s harm?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct?

Directions for Use

~~This instruction combines elements of Civil Code section 3294(a) and 3294(b). The standard of proof under section 3294(a) is clear and convincing evidence; but it is not clear whether the standard of proof for the findings required under section 3294(b) is "clear and convincing" or "preponderance of the evidence."~~

"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585]. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court's reasoning. (See, *e.g.*, *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71]; *Simon v. San Paolo U.S.*

Holding Co., Inc. (2003) 113 Cal.App.4th 1137, 1162, fn. 12 [rejecting an argument that, after *Campbell*, wealth of the defendant may not be considered in awarding punitive damages]; *Henley v. Philip Morris Inc.*, (2003) 112 Cal.App.4th 198, review granted, depublished by *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars].)

At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

~~In State Farm Mutual Automobile Insurance Co. v. Campbell (2003) -- U.S. -- [123 S.Ct. 1513, 1520, 155 L.Ed.2d 585], citing BMW of North America, Inc. v. Gore (1996) 517 U.S. 559, 575 [116 S.Ct. 1589; 134 L.Ed.2d 809], the U.S. Supreme Court reiterated the guideposts courts must consider in reviewing punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the~~

~~difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."~~

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- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College*

Hospital, Inc. v. Superior Court (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713].)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra*, 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ["reasonable relation"] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.07, 54.24[4][d] (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

VF-3905. Damages for Wrongful Death (Death of an Adult) *(New 2004)*

We answer the questions submitted to us as follows:

1. What are [*name of plaintiff***]'s economic damages?**

[a. Past financial support that [*name of decedent***] would have contributed to the family: $_____]**

[b. Future financial support that [*name of decedent***] would have contributed to the family: $_____]**

[c. Past losses of gifts or benefits that [*name of plaintiff***] would have expected to receive from [name of decedent]: $_____]**

[d. Future losses of gifts or benefits that [*name of plaintiff***] would have expected to receive from [***name of decedent***]: $_____]**

[e. [*Name of decedent***]'s funeral and burial expenses: $_____]**

[f. Past household services that [*name of decedent***] would have provided: $_____]**

[g. Future household services that [*name of decedent***] would have provided: $_____]**

2. What are [*name of plaintiff***]'s noneconomic damages?**

[a. The loss of [*name of decedent***]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support, [and] [the enjoyment of sexual relations/ [***name of decedent***]'s training and guidance] from [***insert date of death***] to the present: $_____]**

[b. The loss of [*name of decedent***]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support, [and] [the enjoyment of sexual relations/ [***name of decedent***]'s training and guidance] from today forward: $_____]**

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Delete any questions that do not apply to the facts of the case. Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action.

This form is based on Instruction 3921, *Wrongful Death (Death of an Adult).*

VF-3906. Damages for Wrongful Death (Parents' Recovery for Death of a Minor Child) *(New 2004)*

We answer the questions submitted to us as follows:

1. What are [*name of plaintiff***]'s economic damages?**

[a. Past financial support that [*name of decedent***] would have contributed to the family: $_____]**

[b. Future financial support that [*name of decedent***] would have contributed to the family: $_____]**

[c. Past losses of gifts or benefits that [*name of plaintiff***] would have expected to receive from [***name of decedent***]: $_____]**

[d. Future losses of gifts or benefits that [*name of plaintiff***] would have expected to receive from [***name of decedent***]: $_____]**

[e. [*Name of decedent***]'s funeral and burial expenses: $_____]**

[f. Past household services that [*name of decedent***] would have provided: $_____]**

[g. Future household services that [*name of decedent***] would have provided: $_____]**

2. What are [*name of plaintiff***]'s noneconomic damages?**

[a. The loss of [*name of decedent***]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support from [***insert date of death***] to the present: $_____]**

[b. The loss of [*name of decedent***]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support from today forward: $_____]**

Signed: _____
Presiding Juror
Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Delete any questions that do not apply to the facts of the case. Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action.

This form is based on Instruction 3922, *Wrongful Death (Parents' Recovery for Death of a Minor Child).*

VF-3907. Damages for Loss of Consortium (Noneconomic Damage)

(New 2004)

We answer the question submitted to us as follows:

1. **What are [***name of plaintiff***]'s damages for loss of [his/her] [husband/wife]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support, enjoyment of sexual relations [or the ability to have children]?**

$_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Normally, this form should be combined with the verdict form(s) on the underlying cause(s) of action. Insert the name of the spouse of the injured party as "name of plaintiff."

This form is based on Instruction 3920, *Loss of Consortium (Noneconomic Damage).*

CONCLUDING INSTRUCTIONS

5000. Duties of the Judge and Jury *(Revised 2004)*

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You, and only you, must decide what the facts are. You must consider all the evidence and then decide what you think really happened. You must decide the facts based on the evidence admitted in this trial. You must not let bias, sympathy, prejudice, or public opinion influence your decision.

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are. In addition, the order of the instructions does not make any difference.

Directions for Use

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments. The Advisory Committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Code of Civil Procedure section 608 provides that "[i]n charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict." It also provides that the court "must inform the jury that they are the exclusive judges of all questions of fact." (See also Code Civ. Proc., § 592.)

- Evidence Code section 312(a) provides that "[e]xcept as otherwise provided by law, where the trial is by jury [a]ll questions of fact are to be decided by the jury."

- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478-479 [6 Cal.Rptr. 289, 353 P.2d 929].)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.' [Citations.]" (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid*.)

- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484 [121 Cal.Rptr. 891].)

- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629–630.)

- In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57–59 [118 Cal.Rptr. 184, 529 P.2d 608], the Supreme Court held that the giving of cautionary instructions stating that no undue emphasis was intended by repetition and that the judge did not intend to imply how any issue should be decided should be considered in weighing the net effect of the instructions on the jury.

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 268

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.20.

28 California Forms of Pleading and Practice, Ch. 326, Jury Instructions, § 326.21 (Matthew Bender)

5002~~2~~1. Insurance *(Revised 2004)*

You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based only on the law and the evidence.

Directions for Use

If this instruction is used, the Advisory Committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Evidence Code section 1155 provides: "Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."

- As a rule, evidence that the defendant has insurance is both irrelevant and prejudicial to the defendant. (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 469.)

- Generally, evidence that the plaintiff was insured is not admissible under the "collateral source rule." (*Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1, 16–18; *Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 25–26.)

- Evidence of insurance coverage may be admissible where it is coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831.)

- An instruction to disregard whether a party has insurance may, in some cases, cure the effect of counsel's improper reference to insurance. (*Scally v. Pacific Gas & Electric Co.* (1972) 23 Cal.App.3d 806, 814.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 230–233

Jefferson, California Evidence Benchbook (3rd ed. 1977) §§ 34.32–34.36

California Practice Guide: Civil Trials and Evidence, § 5:371

CONCLUDING INSTRUCTIONS

5003~~3~~2. Evidence *(Revised 2004)*

Sworn testimony, documents, or anything else may be admitted into evidence. You must decide what the facts are in this case from the evidence you have seen or heard during the trial. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. [However, the attorneys for both sides ~~can agree~~ have agreed that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.]

Each side had the right to object to evidence offered by the other side. If I sustained an objection to a question, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness already answered, you must ignore the answer.

[During the trial I granted a motion to strike testimony that you heard. You must totally disregard that testimony. You must treat it as though it did not exist.]

Directions for Use

Read last bracketed paragraph only if testimony was struck during the trial. The Advisory Committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

- Evidence Code section 312 provides:

> Except as otherwise provided by law, where the trial is by jury:
>
> (a) All questions of fact are to be decided by the jury.
> (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Evidence Code section 353 provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)

- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 1997) Trial

50043. Witnesses *(Revised 2004)*

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense ~~the things that~~ what he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? Did the witness show any bias or prejudice? Did the witness have a personal relationship with any of the parties involved in the case? Does the witness have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of his or her race, sex, religion, occupation, sexual orientation, [or] national origin [or [*insert any other impermissible form of bias***].].**

Directions for Use

~~This instruction should be given as an introductory instruction.~~ The Advisory Committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Evidence Code section 312 provides:

  > Except as otherwise provided by law, where the trial is by jury:
  >
  > (a) All questions of fact are to be decided by the jury.
  > (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

  > Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
  >
  > (a) His demeanor while testifying and the manner in which he testifies.
  > (b) The character of his testimony.
  > (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
  > (d) The extent of his opportunity to perceive any matter about which he testifies.
  > (e) His character for honesty or veracity or their opposites.
  > (f) The existence or nonexistence of a bias, interest, or other motive.
  > (g) A statement previously made by him that is consistent with his testimony at the hearing.
  > (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
  > (i) The existence or nonexistence of any fact testified to by him.
  > (j) His attitude toward the action in which he testifies or toward the giving of testimony.
  > (k) His admission of untruthfulness.

- Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact." According to former Code of Civil Procedure section

2061, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

CONCLUDING INSTRUCTIONS

5005~~4~~4. Service Provider for Juror With Disability *(Revised 2004)*

[*Name of juror***] has been assisted by [a/an] [***insert type of service provider***] to communicate and receive information. The [***service provider***] will be with you during your deliberations. You may not discuss the case with the [***service provider***] or in any way involve the [***service provider***] in your deliberations. The [***service provider***] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [***name of juror***].**

Directions for Use

If this instruction is used, the Advisory Committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Code of Civil Procedure section 203(a)(6) provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: … Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."

- Code of Civil Procedure section 224 provides:

  (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.

  (b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.

  (c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in

subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection,* § 322.32 (Matthew Bender)

5005. Multiple Parties *(New 2004)*

[There are [*number*] plaintiffs in this trial. You should decide the case of each plaintiff separately as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of his or her own claim(s). Unless I tell you otherwise, all instructions apply to each plaintiff.]

[There are [*number*] defendants in this trial. You should decide the case against each defendant separately as if it were a separate lawsuit. Each defendant is entitled to separate consideration of his or her own defenses. Unless I tell you otherwise, all instructions apply to each defendant.]

Directions for Use

If this instruction is used, the Advisory Committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- "We realize, of course, that multiple defendants are involved and that each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it. The purpose of this rule is to insure that the jury will distinguish and evaluate the separate facts relevant to each defendant." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 58 [148 Cal.Rptr. 596], internal citations omitted.)

CONCLUDING INSTRUCTIONS

5006. Non-Person Party *(New 2004)*

A [corporation/partnership/city/county/[*other entity***], [***name of entity***], is a party in this lawsuit. [***Name of entity***] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.**

When I use words like "person" or "he" or "she" in these instructions to refer to a party, those instructions also apply to [*name of entity***].**

Directions for Use

This instruction should be given if one of the parties is an entity. Select the type of entity and insert the name of the entity where indicated in the instruction. If this instruction is used, the Advisory Committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Corporations Code section 207 provides that a corporation "shall have all of the powers of a natural person in carrying out its business activities." Civil Code section 14 defines the word "person," for purposes of that code, to include corporations as well as natural persons.

- As a general rule, a corporation is considered to be a legal entity that has an existence separate from that of its shareholders. (*Erkenbrecher v. Grant* (1921) 187 Cal. 7, 9 [200 P. 641].)

- "In general, any person or entity has capacity to sue or defend a civil action in the California courts. This includes artificial 'persons' such as corporations, partnerships and associations." (*American Alternative Energy Partners II, 1985 v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559 [49 Cal.Rptr.2d 686] (internal citations omitted).)

Secondary Sources

9 Witkin, Summary of California Law (9th ed. 1989) Corporations, § 1, p. 511

CONCLUDING INSTRUCTIONS

5007. Removal of Claims or Parties *(New 2004)*

[[*Name of plaintiff***]'s claim for [***insert claim***] is no longer an issue in this case.]**

[[*Name of party***] is no longer a party to this case.]**

Do not speculate as to why this [claim/person] is no longer involved in this case. You should not consider this during your deliberations.

Directions for Use

This instruction may be read as appropriate. If this instruction is used, the Advisory Committee recommends that it be read to the jury before reading instructions on the substantive law.

CONCLUDING INSTRUCTIONS

5008. Duty to Abide by Translation Provided in Court *(New 2004)*

Some testimony was given in [*insert language other than English***]. An interpreter provided translation for you at the time that the testimony was given. You must rely on the translation provided by the interpreter, even if you understood the language spoken by the witness. Do not retranslate any testimony for other jurors.**

Directions for Use

If this instruction is used, the Advisory Committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303 [281 Cal.Rptr. 238].)

- "It is well-settled a juror may not conduct an independent investigation into the facts of the case or gather evidence from outside sources and bring it into the jury room. It is also misconduct for a juror to inject his or her own expertise into the jury's deliberation." (*Cabrera, supra,* 230 Cal.App.3d at p. 303.)

- "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*Cabrera, supra,* 230 Cal.App.3d at p. 304.)

Secondary Sources

1 California Trial Guide, Unit 3, Other Non-Evidentiary Motions, § 3.32 (Matthew Bender)

1A California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence, § 20.13 (Matthew Bender)

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, §§ 91.10, 91.12 (Matthew Bender)

5001~~1~~9. Predeliberation Instructions *(Revised 2004)*

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations. Also, do not immediately announce how you plan to vote. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case. Such training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you or ask to see the exhibits. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the clerk or bailiff. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

[At least nine jurors must agree on each verdict and on each question that you are asked to answer. However, the same jurors do not have to agree on each verdict or each question. Any nine jurors are sufficient. As soon as you have agreed on a verdict and answered all the questions as instructed, the presiding juror must date and sign the form(s) and notify the clerk or the bailiff.]

Your decision must be based on your personal evaluation of the evidence presented in the case. While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you must not simply add up the amounts each juror thinks is right and then make the average your verdict without further discussion and agreement that the amount is a correct verdict based on the evidence.

You may take breaks, but do not resume your discussions until all of you are back in the jury room.

Directions for Use

~~This instruction should be given after the instructions on the substantive law and immediately before the jury retires to deliberate.~~ The Advisory Committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

The sixth paragraph is bracketed because this point appears in the special verdict form instructions. Read if the special verdict instruction (Instruction 5012, *Introduction to Special-Verdict Form*) is not also being read.

Sources and Authority

- Code of Civil Procedure section 613 provides, in part: "When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court."

- Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."

- Code of Civil Procedure section 618 and article I, section 16, of the California Constitution provide that three-fourths of the jurors must agree to a verdict in a civil case.

- The prohibition on chance or quotient verdict is stated in Code of Civil Procedure section 657, which provides that a verdict may be vacated and a new trial ordered "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance." (See also *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064–1065 [18 Cal.Rptr.2d 106].)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)

- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 330, 336

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.01 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, Jury Instructions, § 326.32, Ch. 326A, Jury Verdicts, § 326A.14 (Matthew Bender)

CONCLUDING INSTRUCTIONS

5010. Taking Notes During the Trial *(New 2004)*

If you have taken notes during the trial you will now be allowed to take your notebooks with you into the jury room.

You may use your notes only to help you remember what happened during the trial. Your independent recollection of the evidence should govern your verdict and you should not allow yourself to be influenced by the notes of other jurors if those notes differ from what you remember.

[The court reporter made a record of everything that was said. If during deliberations you have a question about what the witness said, you may ask in writing for the testimony to be read to you. You must accept the court reporter's record as accurate.]

Directions for Use

The last bracketed paragraph should not be read if a court reporter is not being used to record the trial proceedings. If this instruction is used, the Advisory Committee recommends that it be read to the jury after reading instructions on the substantive law.

Sources and Authority

- "Because of [the risks of note-taking], a number of courts have held that a cautionary instruction is required. For example, [one court] held that the instruction should include 'an explanation ... that [jurors] should not permit their note-taking to distract them from the ongoing proceedings; that their notes are only an aid to their memory and should not take precedence over their independent recollection; that those jurors who do not take notes should rely on their independent recollection of the evidence and not be influenced by the fact that another juror has taken notes; and that the notes are for the note taker's own personal use in refreshing his recollection of the evidence. The jury must be reminded that should any discrepancy exist between their recollection of the evidence and their notes, they should request that the record of the proceedings be read back and that it is the transcript that must prevail over their notes.' " (*People v. Whitt* (1984) 36 Cal.3d 724, 747 [205 Cal.Rptr. 810], internal citations and footnote omitted.)

- "In *People v. Whitt*, we recognized the risks inherent in juror note-taking and observed that it is 'the better practice' for courts to give, sua sponte, a cautionary instruction on note-taking. Although the ideal instruction would advert specifically to all the dangers of note-taking, we found the less complete instruction given in Whitt to be adequate: 'Be careful as to the amount of notes that you take. I'd rather that you

observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious note. ... [I]f you do not recall exactly as to what a witness might have said or you disagree, for instance, during the deliberation [sic] as to what a witness may have said, we can reread that transcript back ... .' " (*People v. Silbe*rtson (1985) 41 Cal.3d 296, 303 [221 Cal.Rptr. 152], internal citations and footnote omitted.)

CONCLUDING INSTRUCTIONS

5011. Reading Back of Trial Testimony in Jury Room *(New 2004)*

You may request in writing that trial testimony be read to you. I will have the court reporter read the testimony to you in the jury room. You may request that all or a part of a witness' testimony be read. [There is no written transcript of the testimony, only the court reporter's record.]

Reading testimony takes as long as it took for the testimony to be presented in court. Your request should be as specific as possible. It will be helpful if you can state:

1. **The name of the witness;**

2. **The subject of the testimony you would like to have read; and**

3. **The name of the attorney or attorneys asking the questions when the testimony was given.**

The court reporter is not permitted to talk with you when she or he is reading the testimony you have requested. You can only request him or her to:

1. **Re-read what has already been read to you;**

2. **Skip ahead to a portion of the testimony you are interested in hearing and have requested; and**

3. **Discontinue the reading altogether.**

While the court reporter is in the jury room, you may not deliberate or discuss the case. You must conduct yourself as if the testimony were being presented in court and you were seated in the jury box.

If you disagree on what should be read, please excuse the court reporter, come to a decision among yourselves, and restate your request in writing. You may not ask the court reporter to read testimony that was not specifically mentioned in a written request because the parties and the court are entitled to know what is going to be read to you.

Directions for Use

The advisory committee recommends that this instruction not be given unless the attorneys stipulate to the reading back of testimony.

Sources and Authority

Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into Court. Upon their being brought into Court, the information required must be given in the presence of, or after notice to, the parties or counsel."

"Section 614 of the Code of Civil Procedure provides that if there is a disagreement among jurors during their deliberations as to any part of the testimony which they have heard they may return into court and secure from the court in the presence of counsel for all parties the desired information as to the record. If they ask for testimony relating to a specified subject, they are entitled to hear all of it. However, it is equally clear that the trial judge does not have to order read any part of the record which is not thus requested by the jury foreman." (*McGuire v. W. A. Thompson Distributing Co.* (1963) 215 Cal.App.2d 356, 365–366 [30 Cal.Rptr. 113], internal citations omitted.)

"When the jury requests a repetition of certain testimony, the trial court is not required to furnish the jury with testimony not requested." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 422 [167 Cal.Rptr. 270], internal citations omitted.)

"Appellants assign as error the court's refusal to comply with their counsel's request for testimony reading. It was not. It is not the party to whom the law gives the right to *select* testimony to be read. And the law does not make the party or his attorney the arbiter to determine the jury's wishes." (*Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 714 [37 Cal.Rptr. 652], italics in original.)

CONCLUDING INSTRUCTIONS

5008<u>12</u>. Introduction to Special-Verdict Form *(Revised 2004)*

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. At least nine of you must agree on an answer before you can move on to the next question. However, the same nine or more people do not have to agree on each answer.

When you are finished filling out the form[s], your presiding juror must write the date and sign it at the bottom. Return the form[s] to [me/the bailiff/the clerk] when you have finished.

<u>Directions for Use</u>

<u>If this instruction is read, do not read the sixth paragraph of Instruction 5009, *Predeliberation Instructions.*</u>

Sources and Authority

- Code of Civil Procedure section 624 provides: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law."

- Code of Civil Procedure section 625 provides: "In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. In all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."

- "A special verdict presents to the jury each ultimate fact in the case, so that 'nothing shall remain to the Court but to draw from them conclusions of law.' This procedure

presents certain problems: ‘ “The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. ‘[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings... .’ ” ’ With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. The verdict’s correctness must be analyzed as a matter of law.” (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596], internal citations omitted.)

- “Appellate courts differ concerning the use of special verdicts. In one case the court said, ‘we should utilize opportunities to force counsel into requesting special verdicts.’ In contrast, a more recent decision included the negative view: ‘Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.’ Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result.” (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- “[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury’s further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of ‘the right to a jury of 12 persons deliberating on all issues.’ Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue.” (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 352–355

500~~6~~13. Deadlocked Jury Admonition *(Revised 2004)*

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict and this case is important to the parties.

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that it is wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

Sources and Authority

- "The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction." (*Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 652 [179 Cal.Rptr. 13].)

- "A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118], internal citations omitted.)

- "Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned." (*Inouye, supra,* 126 Cal.App.3d at p. 651.)

CONCLUDING INSTRUCTIONS

500~~7~~14. Substitution of Alternate Juror *(Revised 2004)*

One of your fellow jurors has been excused and an alternate juror has been selected to take [his/her] place. The alternate juror must be given the opportunity to participate fully in your deliberations. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again.

Sources and Authority

- "Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations." (*People v. Collins* (1976) 17 Cal.3d 687, 693 [131 Cal.Rptr. 782].)

- "We agree with plaintiff that the principles set forth in Collins apply to civil as well as criminal cases. The right to a jury trial in civil cases is also guaranteed by article I, section 16 of the California Constitution, and the provisions of the statute governing the substitution of jurors in civil cases are the same as the ones governing criminal cases. The same considerations require that each juror engage in all of the jury's deliberations in both criminal and civil cases. The requirement that at least nine persons reach a verdict is not met unless those nine reach their consensus through deliberations which are the common experience of all of them. Accordingly, we construe section 605 [now 234] of the Code of Civil Procedure to require that the court instruct the jury to disregard all past deliberations and begin deliberating anew when an alternate juror is substituted after jury deliberations have begun." (*Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 584–585 [153 Cal.Rptr. 213], overruled on other grounds in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 702, fn. 4 [21 Cal.Rptr.2d 72], internal citations and footnote omitted.)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 160